Supreme Court, U.S.
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No. 10-124

In The

Supreme Court of the United States

MICHAEL TULLY,

Petitioner,

v.

RUSH COUNTY PROSECUTOR PAUL BARADA, in his individual capacity; and RUSH COUNTY JUVENILE PROBATION OFFICER CATHERINE CUSTER, in her individual capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a person who was not arrested but rather summoned to court on threat of contempt sanctions and arrest to face charges that he violated the law when he had not done so and the state had no evidence that he had done so:

1. Whether his submission to a summons under threat of arrest constitutes a seizure under the Fourth Amendment; and,

2. Whether the U.S. Constitution prohibits his prosecution without probable cause.

PARTIES TO THE PROCEEDINGS
(RULE 14.1(b) STATEMENT)

A list of all parties to the proceedings in the court whose judgment is the subject of the petition is as follows:

Plaintiff-Appellant and Petitioner: Michael Tully.

Defendants-Appellees and Respondents: Paul Barada, Rush County Prosecutor, in his individual capacity; Catherine Custer, Rush County Juvenile Probation Officer, in her individual capacity.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Michael Tully respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the U.S. Court of Appeals for the Seventh Circuit, filed on March 17, 2010.

OPINIONS BELOW

The Court of Appeals for the Seventh Circuit's opinion holding that Petitioner may not assert a federal right under 42 U.S.C. § 1983 to be free from being summoned to court and prosecuted without probable cause, under either the Fourth or Fourteenth Amendments, entered March 17, 2010, is reported at *Tully v. Barada*, 599 F.3d 591 and reproduced at App. 1.

The memorandum order of the United States District Court for the Southern District of Indiana, entered August 7, 2009, granting Respondents' Motion to Dismiss, is reported at *Tully v. Barada*, 2009 U.S. Dist. LEXIS 69238, 2009 WL 2447807 and reproduced at App. 10.

JURISDICTION

On March 17, 2010, the U.S. Court of Appeals for the Seventh Circuit, exercising its jurisdiction pursuant to 28 U.S.C. § 1291 (appeal of a final decision of a

district court), issued an opinion affirming the district court's order. App. 1.

On April 22, 2010, the Seventh Circuit issued an order denying Petitioner's petition for rehearing and request for rehearing *en banc*. App. 26.

This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254(1). This petition is timely under 28 U.S.C. § 2102(c) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after the denial of a timely petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment (in relevant part)

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Federal Statute

42 U.S.C. § 1983 (in relevant part)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

C. State Statutes

Indiana Code 31-37-1-2

A child commits a delinquent act if, before becoming eighteen (18) years of age, the child commits an act that would be an offense if committed by an adult, except an act committed by a person over which the juvenile court lacks jurisdiction under IC 31-30-1.

Indiana Code 14-22-6-9

A person may not:

(1) hunt, shoot, shoot at, or kill an animal; or

(2) shoot at an object;

from within, into, upon, or across a public highway in Indiana.

Indiana Code 14-22-38-1

Except as otherwise provided in this article, a person who violates this article commits a Class C misdemeanor.

Indiana Code 34-13-3-8

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following: . . . (8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

On the evening of December 23, 2006, in rural Rush County, Indiana, Petitioner Michael Tully, who was then seventeen years old, had been hunting with a friend. Following a report of shots having been

fired, the two of them were detained briefly and questioned, but not arrested or cited by a Rush County, Indiana, sheriff's deputy. Michael and his companion had a .22 caliber rifle, a spotlight, and a dead raccoon carcass in Michael's truck. App. 30, 60. Though he did not arrest the boys, the deputy did refer the incident to the Rush County Juvenile Probation Department for further investigation of an "alleged" crime of "shooting from Public Highway." App. 38.

Slightly over two months later, on February 27, 2007, Respondent Custer, a Rush County juvenile probation officer, without any personal knowledge of the events, wrote a "Preliminary Inquiry and Investigation" report, stating that Michael had violated an Indiana statute which prohibits shooting at an object "from within, into, upon, or across a public highway in Indiana." App. 39. *See also* Indiana Code 14-22-6-9. She referred the case to the prosecutor because Michael was unwilling to admit to having committed the offense. App. 62 (Complaint, ¶ 30); App. 42 ("Reasons for Recommendation" . . . "Child was not willing to admit to Shooting from a Public Highway."). The next day, February 28, 2007, Respondent Barada, the Rush County Prosecutor, also lacking personal knowledge of the events, filed a Verified Petition of Delinquency ("Petition") in the Rush County Juvenile Court, affirming under penalty for perjury that:

> On or about the 23rd day of December, 2006, Rush County, Indiana, MICHAEL TULLY did hunt, shoot, shoot at, or kill an animal; or shoot at an object; from within, into, upon,

> or across a public highway in Indiana, all of which is against the peace and dignity of the State of Indiana and contrary to the form of the statute in such case made and provided to-wit: I.C. 14-22-6-9 and would constitute a Class 'C' Misdemeanor if committed by an adult.

App. 36-37.

On March 6, 2007, Michael and his parents were summoned to court to respond to the state's filing of the delinquency petition. App. 44, 47 (Complaint, ¶ 38).[1] That summons "commanded [them] to appear before the Judge of the Court[,]" and stated: "[i]f you fail to appear as above commanded, you may be held in Contempt of Court, and a warrant may be issued by the court." App. 44, 47. Michael submitted to the summons and participated in a juvenile adjudication concerning his raccoon hunting as a result. App. 64 (Complaint, ¶¶ 39-41) (describing proceedings).

On April 26 and May 17, 2007, the Rush Circuit Court held fact finding hearings on the delinquency petition. App. 30. The Court found the allegations of

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[1] In Indiana, as in most other states, a juvenile's commission of an act which would be a crime if committed by an adult constitutes an act of juvenile delinquency. Ind. Code 31-37-1-2. For the delinquent act allegedly committed by Michael, he could have received not only probation but also been ordered incarcerated for up to four months in the state Department of Correction. Ind. Code 31-37-19-6(b)(2)(C).

the petition to be true, and adjudicated Michael a delinquent child. *Id.*

Michael appealed, and the Indiana Court of Appeals reversed, finding that there was only one testifying "witness" to the events underlying Michael's delinquency adjudication (the person who telephoned the police initially), and that this witness could not testify that it was Michael who fired the shots, and "never testified that he saw any shots being fired 'from within, into, upon, or across'" a road. App. 32. The appellate court rejected the state's argument that despite this lack of evidence, it could be "inferred" that Michael committed a delinquent act, an inference, the Court determined, which "stretches the concept of circumstantial evidence beyond its breaking point." *Id.* at 32. The Court of Appeals thus reversed, holding that "[t]here is insufficient evidence to support M.T.'s delinquency adjudication." App. 35.

B. The District Court Proceedings

On September 16, 2008, Michael brought suit against Respondents in the United States District Court for the Southern District of Indiana, alleging violations of the Fourth and Fourteenth Amendments to the United States Constitution arising from Michael being summoned to court and subjected to delinquency proceedings in the absence of probable cause. App. 64.

Respondents filed a motion to dismiss the complaint for failure to state a claim pursuant to Rule

12(b)(6) of the Federal Rules of Civil Procedure. On August 7, 2009, the district court granted the motion, holding that being summoned to court does not constitute a seizure under the Fourth Amendment (App. 19); that "Tully's purported interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects" (*Id.* at 19); and, that "there is no constitutional right not to be prosecuted without probable cause." App. 17.

C. The Appellate Court Proceedings

On March 17, 2010, the Court of Appeals for the Seventh Circuit issued an opinion affirming the District Court's dismissal of the complaint for failure to state a claim upon which relief may be granted, holding that submitting to a summons does not constitute a seizure and that there is no constitutional right not to be prosecuted without probable cause. App. 7. Michael filed a timely petition for rehearing with a suggestion for rehearing *en banc*, which the Seventh Circuit denied on April 22, 2010. App. 26.

REASONS FOR GRANTING THE PETITION

Certiorari Should Be Granted to Establish the Rules That Submitting to a State Command to Appear under Penalties of Contempt and Arrest Constitutes a Fourth Amendment Seizure; and That the Fourth and Fourteenth Amendments Require State Prosecutions to Be Premised on Probable Cause

The framers of our Constitution sought to protect individuals from the ordeal of being seized and prosecuted absent probable cause to suspect them of having committed a crime. This protection distinguishes us from other countries where people can be arrested and prosecuted without any evidence of guilt. This Court has recognized the probable cause standard as the threshold for arrest and continued detention; it should use this case to articulate the same right with respect to prosecutions which occur without the initial step of formal arrests.

Despite this fundamental principle seemingly basic to our society, this Court has never directly articulated a minimum standard necessary for state prosecution to pass constitutional muster, and the circuit court case law on this point is in disarray. The Court should articulate a clear standard in this case, by holding that submission to a court summons constitutes a seizure and that probable cause is required before a proper prosecution can ensue. Seizures and prosecutions without probable cause violate both the Fourth Amendment's unreasonable seizure provision

and the procedural due process guarantee of the Fourteenth Amendment.

A. Michael Tully was Seized for Fourth Amendment Purposes When he Submitted to a Summons Under Threat of Sanctions and Arrest, and Was Then Subjected to a Prosecution without Probable Cause

Michael Tully was prosecuted for shooting from or across a roadway despite having not done so and there being no evidence that he did so. The police officer who responded to the complaint of shots fired had reason to believe that either Michael or his companion had shot and killed a raccoon. This act is lawful and common in rural Indiana. The police officer also knew that the boys had traveled in Michael's truck to and from where they hunted, which is also legal. Tellingly, the officer did not make an arrest that night.

More than a month after the incident, Michael and his parents were summoned to the county probation department and threatened with court sanctions if they failed to appear. App. 61 (Complaint, ¶ 26). They appeared, and were told that charges were going to be filed against Michael. *Id.* (Complaint, ¶ 27). A month later, and despite having no evidence that Michael committed a crime, Respondent Juvenile Probation Officer Custer accused Michael of committing the delinquent act of shooting from or across a road, and referred the case to the

prosecutor because Michael asserted his innocence. App. 62 (Complaint, ¶ 30); App. 42 ("Reasons for Recommendation" . . . "Child was not willing to admit to Shooting from a Public Highway."). Respondent Prosecutor Barada then swore under oath a probable cause affidavit charging Michael with having shot from or across a road, causing the summons to be issued. In so doing, Respondents Custer and Barada subjected Michael to prosecution even though there was no probable cause that a criminal act had been committed. The ensuing prosecution brought about a host of adverse consequences and restrictions on his liberty.

As set forth in Respondent Custer's prefiling investigation, Michael was seventeen years old at the time and had never before been arrested for or charged with a crime. App. 40. He resided at home in rural Rush County with his parents, a farmer and a nurse; he "does what is asked of him at home;" he had no "school problems," where he made "As and Bs;" and, he was involved in extracurricular activities, such as "SADD [Students Against Drunk Driving], FFA [Future Farmers of America], and Varsity Scholars." App. 40-42. Michael detassled corn in the summers for employment, and "enjoyed hunting in his spare time." *Id.*

Other than Michael and his friend, there was only one "witness" to the shooting, a person who heard the shots but did not actually see anything. The shooting occurred at night when it was dark, and that person was unable to testify: 1) where the two

shots he heard were fired from; and, 2) who had fired them. The state presented no evidence that either of the two shots at issue were fired by Michael or from or across a road. App. 32-33.

In fact, it was not Michael, but his friend, who had exited the vehicle and shot at the raccoon from a ditch where the raccoon was. App. 58 (Complaint, ¶¶ 9, 10). This shooting was lawfully done pursuant to the statute.

Despite the lack of any evidence that Michael had fired any shots or where the shots were fired from or to, the juvenile court judge concluded Michael was guilty of having shot from or across a roadway. Michael was fined, and the court placed conditions on his movements, forbade him from possessing firearms, placed him on probation, subjected him to random drug testing, and required him to "waive [his] right against unreasonable searches," subjecting his "person and property" to search "at any time." App. 53 (conditions of probation, ¶ 15).

After obtaining Michael's conviction, Prosecutor Barada dismissed the charges against his hunting companion (who actually fired the shots) for lack of "trial quality evidence," even though those charges were based on the same evidence used to convict Michael. App. 64 (Complaint ¶¶ 43-44).

Although he had obeyed the law, Michael was falsely accused of having committed a criminal or delinquent act, summoned to court under threat of contempt and arrest, forced to hire a lawyer to defend

himself, and subjected to criminal-like proceedings; additionally, he suffered emotional distress, mental anguish, embarrassment, humiliation and loss of liberty. App. 58 (Complaint at 9); App. 44 (Summons).[2]

B. Michael's Submission to the Summons Constituted a Fourth Amendment Seizure

Michael was not arrested at the scene by the responding deputy; rather it was the prosecutor who later filed charges causing him to be summoned under threat of arrest. Michael submitted to this show of authority and hence was seized for Fourth Amendment purposes. *Albright v. Oliver*, 510 U.S. 266, 268, 271, (1994) (Rehnquist, C.J.) (plurality opinion) ("When he learned of the outstanding [arrest] warrant, petitioner surrendered to respondent, Roger Oliver, a police detective. . . . He was released after posting bond, one of the conditions of which was that he not leave the State without permission of the court."); *id.* at 271 ("his surrender to the State's show of authority constituted a seizure for purposes of the Fourth Amendment.") (citing *Terry v. Ohio*, 392 U.S. 1, 19

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[2] Because the district court decided this matter in the context of a motion to dismiss, the facts pled in the complaint, along with reasonable inferences, should be taken as true. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' [*Bell Atlantic Corp. v.*] *Twombly*, 550 U.S. 544, 570 (2007)").

(1968); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989)).

This Court recognized in *Gernstein v. Pugh*, 420 U.S. 103 (1975), that even pretrial release "may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Id.* at 114. As Justice Ginsburg observed in *Albright*:

> This view of the definition and duration of a seizure comports with common sense and common understanding. A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.
>
> A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still "seized" in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed "seized" for trial, so long as he is bound to appear in court and

> answer the state's charges. He is equally bound to appear, and is hence "seized" for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.

Albright, 510 U.S. at 278-79 (Ginsburg, J., concurring).

Despite *Albright's* teaching that submitting to a show of state authority constitutes a Fourth Amendment seizure, the Seventh Circuit determined "that Tully was not seized within the meaning of the Fourth Amendment merely by being summoned to appear in court[.]" App. 8-9.

While some Circuits follow *Albright* on this issue, a number of them, like the Seventh Circuit, continue to rule that submitting to a court summons does not constitute a Fourth Amendment seizure. *Compare, e.g.*, *Evans v. Ball*, 168 F.3d 856 (5th Cir. 1999) (combination of summons, processing and bail conditions amounted to a seizure); *Gallo v. City of Phila.*, 161 F.3d 217 (3d Cir. 1998) (as amended) (Dec. 7, 1998) (pretrial release conditions amounted to a seizure); *Murphy v. Lynn*, 118 F.3d 938 (2nd Cir. 1997) (order that arrestee not leave state and that he make court appearances constituted a seizure) (but, *see*, *Burg v. Gosselin*, 591 F.3d 95, 98 (2d Cir. 2010)) ("We hold that the issuance of a pre-arraignment, non-felony summons requiring a later court appearance, without further restrictions, does not constitute a Fourth Amendment seizure."); *Bielanski v. County of Kane*, 550 F.3d 632, 642 (7th Cir. 2008) (collecting

cases) (rejecting "continuing seizure" theory where person summoned to court, could not leave state without court permission, and required to submit to interview with probation officer); *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007) (person summoned on Medicaid fraud charge but not arrested nor incarcerated not subject to seizure); *DiBella v. Borough of Beachwood*, 407 F.3d 599 (3rd Cir. 2005) (distinguishing *Gallo*) (person subject to court appearances on trespass charge not seized); *Kingsland v. City of Miami*, 382 F.3d 1220, 1236 (11th Cir. 2004) (no continuing seizure arises from bond and requirement to appear at criminal proceedings); *Karam v. City of Burbank*, 352 F.3d 1188 (9th Cir. 2003) (requirements that person appear in court and not travel interstate does not amount to seizure); *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001) (collecting cases) (requirement to appear in court does not amount to seizure).

A reasonable person receiving a summons from the government "commanding" them to appear at a certain time and place or else face sanctions and arrest would not feel at liberty to ignore the command. Justices Rehnquist and Ginsburg's opinion that submitting to such a show of state authority amounts to a seizure under the Fourth Amendment comports with common sense and this Court's jurisprudence. *Albright*, 510 U.S. at 271; *Terry*, 392 U.S. at 19, n.16 (A "seizure" triggering the Fourth Amendment's protections occurs when government actors have, "by means of physical force or show of authority, . . . in some way restrained the liberty of a

citizen,"); *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (a seizure occurs when a reasonable person would believe that he or she is not "free to leave."); *Fla. v. Bostick*, 501 U.S. 429, 436-437 (1991) ("the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."); *Brower v. County of Inyo*, 489 U.S. at 599 ("We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.").

A summons to appear to answer to an accusation of criminal or delinquency charges accompanied by the threat of arrest represents a significant exercise of the state's coercive power. When an individual submits to such a show of authority, he is obeying the command of the state over his person, is not "free to leave," in any relevant sense, and is thus seized for purposes of the Fourth Amendment.

Certiorari should be granted to confirm *Albright*'s teaching in this regard, and resolve the Circuit split on whether submitting to a show of state authority of a summons under threat of sanctions and arrest constitutes a seizure under the Fourth Amendment.

C. Probable Cause is Required for Prosecution Under the Fourth Amendment

The Court of Appeals' conclusion that there is no constitutional right not to be prosecuted without probable cause contravenes the tenet that ours is a

society of limited government with imposed restrictions on the use of its most coercive powers.

This Court has recognized that:

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life.

Young v. United States ex rel. Vuitton Et Fils S. A., 481 U.S. 787, 814 (1987).

In 1940, then-Attorney General Robert Jackson described the "most dangerous power of the prosecutor" as "the power to pick people that he thinks he should get, rather than pick cases that need to be prosecuted. . . ." Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. Am. Judicature Soc'y 18, 19 (1940); *see Morrison v. Olson*, 487 U.S. 654, 727-29 (1988) (Scalia, J., dissenting) (quoting Jackson's speech to illustrate that "[o]nly someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation."). As Justice Stevens, who himself had served as a special prosecutor earlier in his

career, observed in dissent in *Albright*: "I can think of few powers that the State possesses which, if arbitrarily imposed, can harm liberty as substantially as the filing of criminal charges." *Albright,* 510 U.S. at 312 (Stevens, J., dissenting).

The probable cause standard for prosecution provides a safeguard against prosecutorial abuse and safeguards our basic liberty.

Long ago, Chief Justice Shaw of the Massachusetts Supreme Court described the right not to be prosecuted unless probable cause exists as one of the most basic in our land:

> The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

Jones v. Robbins, 74 Mass. 329, 344 (1857).

The Fifth Amendment limits the federal government's power to prosecute persons for serious crimes. Under that Amendment, no such prosecution may issue except on a grand jury determination that there

is probable cause to support the accusation.[3] *United States v. Calandra*, 414 U.S. 338, 343 (1974) (grand jury's historic functions include "the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions."). In *Hurtado v. California*, 110 U.S. 516 (1884), this Court concluded that the grand jury requirement of the Fifth Amendment did not apply to the states, in part because the state's [California's] requirement of a judicial determination "to the probable guilt of the defendant." *Id.* at 538.

In *Gernstein* this Court recognized the probable cause standard contained in the Fourth Amendment was applicable to the states both for arrest and for continued detention:

> Both the standards and procedures for arrest and detention have been derived from the Fourth Amendment and its common-law antecedents. See *Cupp v. Murphy*, 412 U.S. 291, 294-295 (1973); *Ex parte Bollman*, 4 Cranch 75 (1807); *Ex parte Burford*, 3 Cranch 448 (1806). The standard for arrest is probable cause, defined in terms of facts and circumstances "sufficient to warrant a prudent man in believing that the [suspect] had

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[3] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger. . . ." U.S. Const., Amdt. 5.

> committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). See also *Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949). This standard, like those for searches and seizures, represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime.
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.

Gernstein, 420 U.S. at 111-112.[4]

At least as stringent a standard should apply beyond arrest and continued detention to the charging decision itself, where state officials have the opportunity to consider the evidence, or lack thereof, more fully. To require less would not only be inconsistent with the arrest and continued detention standard, but would "leave law-abiding citizens at the mercy of the [prosecutor's] whim or caprice." *Gernstein*, 420 U.S. at 112. It would make no sense to hold a prosecutor, who has the training and time to

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[4] In dicta relegated to a footnote, the Gerstein Court suggested that probable cause was not required for an indictment unaccompanied by an arrest. *Id.*, 420 U.S. at 125, n.26. The plurality decisions in *Albright* ignored this dicta when rejecting such claims as arising under the substantive guarantees of the Fourteenth amendment and suggesting that the Fourth Amendment was the proper, albeit unraised, source of any such right.

consider and evaluate the evidence before making the charging decision, to a lesser standard than required of a police officer in the field, who often has to make an instantaneous decision whether probable cause exists to arrest. The Seventh Circuit would not impose *any* standard on prosecutions, a rule contrary to western jurisprudence and one which threatens our most basic freedoms.

D. The Lower Federal Courts' Jurisprudence on Whether a Prosecution Without Probable Cause Violates the Constitution is in Disarray

The issue of whether there is a constitutional right not to be prosecuted without probable cause is important and needs to be answered directly because it controls whether a person so prosecuted and vindicated can subsequently bring a 42 U.S.C. §1983 civil rights action seeking damages for such a prosecution. This Court should grant certiorari to clarify the law in this area, and hold that probable cause is required for state prosecutions, that such claims arising from its absence should be analyzed under the Fourth and Fourteenth Amendments, and that the objective reasonableness standard applicable to claims under the Fourth Amendment applies to such claims, rather than the subjective element of maliciousness utilized in state tort law.

Many lawsuits seeking compensation for prosecutions initiated without probable cause have been

labeled "malicious prosecution," by litigants and courts, borrowing from the common law tort of malicious prosecution.[5]

In *Albright* a plurality of this Court opined that the substantive guarantees of the Fourteenth Amendment's due process clause do not encompass the right not to be prosecuted without probable cause, and, that if such a right exists, it most likely emanates from the Fourth Amendment's unreasonable seizure proscription. *Albright*, 510 U.S. at 266 (Rehnquist, O'Conner, Scalia, and Ginsburg).

As the *Albright* plurality recognized: "the extent to which a claim of malicious prosecution is actionable under §1983 is one 'on which there is an embarrassing diversity of judicial opinion.'" 501 U.S. at 270 (citations omitted, collecting cases).

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[5] The common law tort of malicious prosecution contains the following elements:

a. There must be a criminal action initiated by the defendant;

b. The action must have been terminated in the plaintiff's favor;

c. Probable cause to prosecute must have been absent; and,

d. The defendant must have acted with malice towards the plaintiff.

See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 119, pp. 876-882 (5th ed. 1984).

In *Wallace v. Kato*, 594 U.S. 384, 390, n.2 (2007), the Court, citing *Albright's* plurality opinions, explained that it has "never explored the contours of a Fourth Amendment malicious-prosecution suit under Section 1983;" recognized a "range of approaches" on such claims in the lower courts; and, did not foreclose such claims, but rather "assumed, without deciding," that such claims were cognizable under §1983. *Id.* at 390, n.2. *See also Albright*, 510 U.S. at 271 ("Most of the lower courts recognize some form of malicious prosecution action under § 1983.").

Though the Court's plurality decision in *Albright* concluded that any such claim would come under the Fourth Amendment rather than the substantive due process clause of the Fourteenth Amendment, it did not set forth the elements of such a claim, and provided little direction to lower courts. Subsequently, a number of courts have commented on *Albright's* lack of guidance and the resulting disarray in the law: *Albright*: "spawned controversy and confusion in the lower courts," *Kerr v. Lyford*, 171 F.3d 330, 342 (5th Cir. 1999) (Jones, J., concurring); "created great uncertainty in the law," *Gallo v. City of Phila.*, 161 F.3d 217, 222 (3d Cir. 1998); engendered "considerable confusion," *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1070 n.4 (9th Cir. 2004); and, "muddied the waters rather than clarified them." *Taylor v. Meacham*, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996).

The Circuits have generally split on whether and to what extent the common law elements of the tort of

malicious prosecution are relevant to § 1983 claims under the Fourth or Fourteenth Amendments.

The First, Second, and Eleventh Circuits require plaintiffs pleading malicious prosecution claims under § 1983 to also satisfy the common law elements of the claim in addition to proving a constitutional violation. *See Shaarbay v. Palm Beach County Jail*, 350 Fed. Appx. 359, 362 (11th Cir. 2009) ("In order to prove malicious prosecution under § 1983, a plaintiff must establish '(1) the elements of the common law tort of malicious prosecution, and (2) a violation of [his] Fourth Amendment right to be free from unreasonable seizures.'" (quoting *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004)); *Jones v. City of Boston*, 135 Fed. Appx. 439, 439-440 (1st Cir. 2005) (affirming district court's dismissal of complaint for failure to state federal or state malicious prosecution claim due to absence of facts supporting common law element that related criminal prosecution had terminated in plaintiff's favor) (citing *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) (describing elements of the common-law malicious prosecution cause of action in Massachusetts)); *Kinzer v. Jackson*, 316 F.3d 139, 143 (2d Cir. 2003) ("To sustain a § 1983 claim of malicious prosecution, a plaintiff must demonstrate conduct by the defendant that is tortious under state law and that results in a constitutionally cognizable deprivation of liberty. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116-17 (2d Cir. 1995)").

The Fourth, Fifth, Seventh, and Tenth Circuits instead concentrate on whether a constitutional violation exists. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1290 (10th Cir. 2004) ("We . . . reject[ ] the view that a plaintiff does not state a claim actionable under § 1983 unless he satisfies the requirements of an analogous common law tort."); *Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003) (*en banc*), *cert. denied*, 543 U.S. 808 (2004) (reviewing Circuit split) ("The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection. . . . [S]ome such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion."); *Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001) ("[M]alicious prosecution is not tenable as an independent constitutional theory. . . ."); *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000) ("[T]here is no such thing as a '§ 1983 malicious prosecution' claim. . . . [It] is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution. . . . It is not an independent cause of action." (citation omitted)).

Judge Higginbotham's opinion for the *en banc* Fifth Circuit in *Castellano* is particularly insightful, for it not only surveys the legal landscape on this issue, but also forcefully concludes that the Fourth Amendment's objective reasonableness test should control rather than a grafting of the subjective element of malice from the common law tort of

malicious prosecution. *Castellano*, 352 F.3d at 942-961.

As this Court taught in *Graham v. Connor*, 490 U.S. 386 (1989), the specific constitutional provision under which a §1983 claim is brought should be identified, and, that provision's parameters controlling. *Id.* at 395 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of . . . governmental conduct," . . . , "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

Although the Court may look to the common law "when [thinking] about elements of actions for constitutional violations . . . the common law is best understood here more as a source of inspired examples than of prefabricated components of [constitutional] torts." *Hartman v. Moore*, 547 U.S. 250, 258 (2006) (citation omitted).

The line of cases requiring the subjective *mens rea* element of a state tort of malicious prosecution claim in order to prove a Fourth Amendment violation conflict with the objective reasonableness standard of the Fourth Amendment.

In other contexts, this Court has "rejected reasoning that 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States,'" *Daniels v. Williams*, 474 U.S. 327, 332 (U.S. 1986) (quoting *Paul v. Davis*, 424 U.S. 693, 701

(1976). The same reasoning should serve to reject the *mens rea* element of a malicious prosecution claim for a constitutional violation of a prosecution without probable cause.

Under the Fourth Amendment, the test of whether a state actor's actions are reasonable is an objective one; the actor's own motivations are not legally relevant. *L.A. County v. Rettele*, 550 U.S. 609, 614 (2007) ("The test of reasonableness under the Fourth Amendment is an objective one.") (citing *Graham,* 490 U.S. at 397); *Whren v. United States,* 517 U.S. 806, 813 (1996) ("[W]e have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Graham*, 490 U.S. at 397 (subjective motivations of individual officers have no bearing on whether a particular seizure is unreasonable under the Fourth Amendment).

This Court should grant certiorari to clarify the law in this area, and hold that probable cause is required for state prosecutions, that such claims arising from its absence should be analyzed under the Fourth Amendment, and that the objective reasonableness standard applicable to claims under that Amendment applies, rather than the subjective element of maliciousness.

The question of whether there is a right not to be prosecuted without probable cause is an important one which affects both the distributive and normative quality of justice in our society. The present unsettled

state of the law permits litigants in some states to be compensated for the real harm created by baseless prosecutions, while denying any remedy to other persons who happen to live in states whose circuit courts refuse to recognize such a right. *Compare e.g.*, *Webb v. Sloan*, 330 F.3d 1158, 1163 (9th Cir. 2003) (affirming jury verdict of $80,000 on behalf of African American arrested and prosecuted without probable cause, where prosecutors continued to prosecute plaintiff despite police officers recanting accusations and where prosecutor refused to dismiss criminal charges unless plaintiff agreed to civil waiver of liability) (noting that in response to special interrogatories, "the jury found that Defendant Carson City had a custom, policy, or practice that violated Plaintiff's federal constitutional right not to be prosecuted without probable cause."); *Freeman v. Guy*, 303 Fed. Appx. 358, 362-363 (7th Cir. 2008) (affirming dismissal of § 1983 action brought by plaintiff who "claimed that he had been arrested and charged without probable cause on 13 occasions due to the prosecutor's animosity toward the arrestee.") ("[T]here is no constitutional right not to be prosecuted without probable cause," and a plaintiff cannot "state a section 1983 claim simply by showing that he was wrongly prosecuted.") (citation omitted); *Vercel v. Ligon-Hanes*, 2010 U.S. Dist. LEXIS 32439, *7 (N.D. Ind. Mar. 31, 2010) ("Plaintiff alleges that this arrest was retaliatory for his political views and was a result of racial discrimination. Plaintiff alleges that he was arrested because he publicly opposed the mayor's re-election and because the mayor's administration

'eliminated white people out of the administration and their positions in the city.'") (dismissing case in part because "[t]he Court of Appeals for the Seventh Circuit has clarified this issue even further, stating that 'there is no constitutional right not to be prosecuted without probable cause' and a plaintiff cannot 'state a section 1983 claim simply by showing that he was wrongly prosecuted.'").

This Court had an opportunity to clarify this area of the law recently when it granted certiorari in *Pottawattamie County v. McGhee*, 129 S. Ct. 2002 (2009). However, the case settled after oral argument and certiorari was dismissed. 130 S. Ct. 1047 (2010). Although the types of prosecutorial conduct at issue in *Pottawattamie* and this case were different, both cases represent the genre of cases sometimes referred to as "malicious prosecution." This case presents the Court with the opportunity lost in *Pottawattamie* to articulate the constitutional standards for these types of cases and provide guidance to the lower federal courts.

E. Prosecutions without Probable Cause Also Violate Fourteenth Amendment Procedural Due Process Guarantees

The prosecutor's actions in this case violated not only the Fourth Amendment, but also the procedural due process interests protected by the Fourteenth Amendment.

In *Albright* this Court rejected the contention that a prosecution without probable cause violated substantive due process, and suggested that the Fourth Amendment was the Constitutional mooring for such claims. Even so, the Court did not foreclose litigants from proceeding under a procedural due process theory. Indeed, at least four Justices appeared to conclude that such a right would exist under certain circumstances.

Justice Kennedy, writing for himself and Justice Thomas, concurred in the plurality's conclusion that probable cause-lacking prosecutions do not offend substantive due process, but specifically left open the possibility that such prosecutions violate *procedural* due process, at least where a state does not provide an adequate post-deprivation tort remedy for malicious prosecution:

> The common law of torts long recognized that a malicious prosecution, like a defamatory statement, can cause unjustified torment and anguish – both by tarnishing one's name and by costing the accused money in legal fees and the like. We have held, of course, that the Due Process Clause protects interests other than the interest in freedom from physical restraint, . . . and for purposes of this case, we can assume, arguendo, that some of the interests granted historical protection by the common law of torts (such as interests in freedom from defamation and malicious prosecution) are protected by the Due Process Clause.

Albright, 510 U.S. at 283-84 (internal citations omitted).

Justice Kennedy did not answer the question definitively, but his opinion strongly suggests that such protection exists. *Id.* at 286 ("if a State did not provide a tort remedy for malicious prosecution, there would be force to the argument that the malicious initiation of a baseless criminal prosecution infringes an interest protected by the Due Process Clause and enforceable under § 1983.").

Justices Stevens and Blackmun in dissent opined that baseless prosecutions would violate procedural due process rights. *Id.* at 300. ("[C]ommencement of a criminal case deprives the accused of liberty, [and] the state has a duty to make a probable-cause determination before filing charges.").

With respect to procedural due process and Justice Kennedy's criterion of whether the state provides an adequate post-deprivation process, Indiana does not permit claims for malicious prosecution against police officers or prosecutors. *Foster v. Pearcy,* 387 N.E.2d 446, 449 (Ind. 1979) (holding "where . . . acts are reasonably within the general scope of authority granted to prosecuting attorneys, no liability will attach" and affirming prior case law that prosecutors are absolutely immune from suits for malicious prosecution); *Livingston v. Consolidated City of Indianapolis*, 398 N.E.2d 1302, 1306 (Ind. Ct. App. 1979) ("We hold, therefore, that in accordance with the plain wording of Ind. Code 34-4-16.5-3,

Subsection 5 [now 34-13-3-3(8)], immunity is granted to the State and municipal subdivisions and police officers in actions for malicious prosecution.").

Indiana's lack of a remedy for malicious prosecution against governmental actors can hardly be considered "adequate" for Fourteenth Amendment procedural due process purposes.

This is not to say that Petitioner agrees that the availability of a state remedy for malicious prosecution would negate a Fourteenth Amendment procedural due process right. This Court's due process jurisprudence on this point is underpinned by the rationale that some state deprivations are random and unauthorized, and hence pre-deprivation hearings are by definition unavailable and adequate post-deprivation remedies are all the process that is required. *See Parratt v. Taylor,* 451 U.S. 527, 543-44 (1981) (prisoner claimed negligence of correction official deprived him of property "without due process of law.") (a pre-deprivation remedy was infeasible and the State's post-deprivation remedy was considered adequate to prevent a constitutional violation) *reversed on negligence component, Daniels*, 474 U.S. at 332; *Hudson v. Palmer*, 468 U.S. 517, 533 (1984), (prisoner alleged that a prison guard intentionally destroyed his property) (due process clause not violated by random and unauthorized intentional deprivations of property "until and unless it provides or refuses to provide a suitable post deprivation remedy").

Here, the procedural deprivation was authorized by the only state official who could initiate the deprivation, and a pre-deprivation remedy, *i.e.*, a hearing on whether probable cause exists, is not only feasible, but is standard practice and constitutionally required for warrantless arrests and continued detentions. *Gernstein,* 420 U.S. at 111-112. This Court should clearly articulate that such a probable cause hearing is required for all state-initiated prosecutions. Requiring such a probable cause determination would be consistent with this Court's immunity doctrine, which provides that prosecutors do not enjoy absolute immunity until they have probable cause for arrest. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993).[6]

F. A Separate Basis to Vacate the Judgment Below Arises From the Prosecutor Having Sworn to Untrue Facts in the Probable Cause Affidavit

A separate basis to vacate the judgment of the Court of Appeals is that it conflicts with this Court's holding in *Kalina v. Fletcher*, 522 U.S. 118 (1997).

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[6] Prosecutors generally enjoy absolute immunity for actions taken in their prosecutorial function, an immunity waived by Respondent Barada in this case. App. 7 (*Tully v. Barada*, 599 F.3d at 594) (summarizing: "Tully has managed to overcome the affirmative defenses of absolute immunity, the existence of probable cause, and *res judicata*, because the defendants waived them all.").

In *Kalina* this Court considered the issue of prosecutors who swear to untrue facts in a probable cause affidavit for arrest, and held that prosecutors can be liable for such acts, as they enjoy qualified rather than absolute immunity when swearing to such evidence.

The prosecutor in this case swore that Michael Tully shot from or across a roadway despite having no personal knowledge or evidence that he did so. When prosecutors sign such probable cause affidavits, they are acting as witnesses rather than advocates, and, under this Court's functional approach to absolute immunity, lose their absolute immunity to suit. *Kalina*, 522 U.S. at 130-31 ("Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.").

Under such circumstances, prosecutors are acting not in an advocacy function but rather as complaining witnesses, and lose absolute prosecutorial immunity. *Kalina*, 522 U.S. at 131 ("§ 1983 may provide a remedy for respondent insofar as petitioner performed the function of a complaining witness.").

Thus, because he was acting as a witness rather than a lawyer when he signed the probable cause

affidavit under oath attesting to facts which were untrue and about which he had no personal knowledge, Prosecutor Barada can thus be held liable under § 1983 for a violation of Michael Tully's Fourth and Fourteenth Amendment rights to be free from prosecution without probable cause.

CONCLUSION

For the foregoing reasons, Petitioner Michael Tully requests that the Court grant certiorari, vacate the judgment of the Court of Appeals, and rule that a person submitting to the show of state authority represented by a court summons under threat of arrest, and being bound over for prosecution, is seized for purposes of the Fourth Amendment, and, that the U.S. Constitution prohibits prosecutions without probable cause under the Fourth Amendment and the procedural due process protections of the Fourteenth Amendment.

Respectfully submitted,

Dated: July 21, 2010

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